

Tong Kam Yew & Anor v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
B-05-63 OF 2011

APANDI ALI, LINTON ALBERT AND HAMID SULTAN JJCA
20 MARCH 2013

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Two accused charged for trafficking in dangerous drugs — Alternative charge of possession — Trial judge sentenced both accused to death without mentioning alternative charge — Whether charge amended to include alternative charge — Whether trial judge erred — Whether trial judge misdirected in law and in fact — Whether there was mens rea for possession

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The appellants were charged for trafficking in 143.8g of methamphetamine ('P4'), and 12g nimetazepam ('P5'), both offences under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). Alternatively, they were charged for possession, as per exhs 'P6' and 'P7' under s 12(2) of DDA. At the end of the prosecutions case, the trial judge held that a prima facie case had been established against the two accused persons as per the two counts of drug trafficking, P4 and P5. However, no mention was made about the alternative charges in the judgment. At the close of the defence case, the trial judge held that the prosecution had proved P4 against the two accused and sentenced them to death without mentioning anything about P5 and no mention at all of P6 and P7. In the present appeal, the appellant submitted that the learned trial judge had misdirected herself and erred in law and in fact by: failing to direct her mind to the alternative charges; failing to rule whether the prosecution had proved P5 beyond reasonable doubt; prematurely and/or wrongly impeaching witnesses SP2 and SD2; by finding that there was mens rea for possession proven and by failing to appreciate the defence of the first appellant.

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Held, allowing the appeals:

- (1) The judgment of the trial court was inchoate, not focused and the grounds of the judgment showed that the integrity of the decision making process had been compromised without adhering to the strict provision of the Criminal Procedure Code ('CPC') and that too in a capital punishment case where the Federal Constitutional provisions were clear that the court could only take the life of a person according to law (see para 9).
- (2) The prosecution preferred two charges for trafficking and in the alternative, possession which carried lesser sentence and the law at the end of trial required the court to consider the relevant charges as well as

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- A the evidence. By calling defence for two charges and finding only one charge had been proven when both types of drugs were seized at the same time with no explanation, compromised the decision and was also in conflict, ie one charge trafficking proved and the other charge not proved.
- B There was also no order for acquittal in respect of the second charge which technically would be hanging over the heads of the appellants and such a decision was not only perverse but also in breach of s 182A of the CPC. The trial court readily went and applied the presumption of trafficking without addressing its mind to the fact that the prosecution per se was not sure whether it was a case of trafficking or possession. The trial court should have deliberated on the issue of possession before applying its mind to trafficking which at the end of the day might result in capital punishment (see paras 10–11).
- C
- D (3) Just because the accused had been called to enter defence for trafficking did not necessarily mean the issue relating to possession should not be considered at all. There was duty and obligation on the part of the trial judge to hear what the accused or his witness had to say in relation to their defence notwithstanding the evidence adduced might be hearsay or even dock statement or even a statement which could be perceived to be self-serving statement (see para 13).
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- F (4) The factual matrix of the case did not warrant a re-trial but only an acquittal as miscarriage of justice had set in at the prosecution stage as well as at the end of trial and the integrity of the whole trial process had been compromised (see para 20).
- G (5) The issues relating to impeachment were purely procedural and could not be cured under s 422 of the CPC or s 60 of the Courts of Judicature Act 1964. The two witnesses as well as the statement of the Myanmar national which was not allowed to be admissible on the grounds the defence did not take steps to trace the witness when the evidence was that the Myanmar National had left the country was perverse to the defence to rebut the presumption of trafficking which carried the penalty of death (see para 30).

H **[Bahasa Malaysia summary]**

- I Perayu-perayu telah dituduh mengedar 143.8g methamphetamine ('P4') dan 12g nimetazepam ('P5'), kedua-dua kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Secara alternatif, mereka telah dituduh dengan milikan, menurut eksh 'P6' dan 'P7' di bawah s 12(2) ADB. Pada akhir kes pihak pendakwaan, hakim bicara memutuskan bahawa kes prima facie wujud terhadap kedua-dua tertuduh menurut dua kiraan pengedaran dadah, P4 dan P5. Walau bagaimanapun, tiada apa-apa yang disebut mengenai tuduhan alternatif di dalam penghakiman. Pada penutup kes pembelaan, hakim bicara memutuskan bahawa pihak pendakwaan telah membuktikan P4

terhadap kedua-dua tertuduh dan menjatuhkan hukuman mati terhadap mereka tanpa menyebut apa-apa tentang P5 dan tiada apa-apa langsung yang disebut tentang P6 dan P7. Di dalam rayuan ini, perayu telah berhujah bahawa hakim bicara yang bijaksana telah salah arah dan terkhilaf dalam undang-undang dan fakta dengan: gagal untuk mengarahkan minda beliau kepada tuduhan alternatif; gagal untuk memutuskan sama ada pihak pendakwaan telah membuktikan P5 melampaui keraguan yang munasabah; dengan pra-matang dan/atau dengan salah mencabar saksi-saksi SP2 dan SD2; dengan mendapati bahawa terdapat mens rea untuk milikan yang telah dibuktikan dan kegagalan untuk mengamati pembelaan perayu pertama.

Diputuskan, membenarkan rayuan-rayuan:

- (1) Penghakiman mahkamah perbicaraan adalah tidak sempurna, tidak fokus dan alasan-alasan penghakiman menunjukkan bahawa kesahihan proses membuat keputusan telah terjejas tanpa mematuhi peruntukan ketat Kanun Tatacara Jenayah ('KTJ') dan begitu juga kes hukuman mati di mana peruntukan Perlembagaan Persekutuan jelas menyatakan bahawa mahkamah hanya boleh mengambil nyawa seseorang mengikut undang-undang (lihat perenggan 9).
- (2) Pihak pendakwaan memilih kedua-dua tuduhan pengedaran dan dalam alternatif, milikan yang mana membawa hukuman yang lebih ringan dan undang-undang pada akhir perbicaraan memerlukan mahkamah untuk mempertimbangkan tuduhan relevan dan juga keterangan. Dengan memanggil pembelaan untuk kedua-dua tuduhan dan mendapati bahawa hanya satu tuduhan yang perlu dibuktikan apabila kedua-dua jenis dadah dirampas tanpa apa-apa penjelasan, menjejaskan keputusan dan juga dalam percanggahan, iaitu satu tuduhan mengedar telah dibuktikan dan satu lagi tidak dapat dibuktikan. Tidak terdapat juga perintah pelepasan berkenaan dengan tuduhan kedua yang secara teknikal tidak diselesaikan oleh perayu-perayu dan keputusan sedemikian bukan sahaja berlawanan tetapi juga bercanggah dengan s 182A KTJ. Mahkamah perbicaraan dengan sedia telah menggunapakai anggapan mengedar tanpa mengarahkan minda kepada fakta bahawa pihak pendakwaan per se tidak pasti sama ada ia adalah kes pengedaran atau milikan. Mahkamah perbicaraan sepatutnya mempertimbangkan isu milikan sebelum mengarahkan minda kepada pengedaran yang mana akhirnya akan membawa kepada hukuman mati (lihat perenggan 10–11).
- (3) Hanya kerana tertuduh telah dipanggil untuk memasukkan pembelaan untuk mengedar tidak semestinya bermaksud isu berkenaan dengan milikan tidak harus dipertimbangkan langsung. Terdapat kewajipan dan tanggungjawab bagi pihak hakim bicara untuk mendengar apa yang perlu dikatakan oleh tertuduh atau saksinya berkenaan dengan

- A pembelaan mereka tanpa mengira keterangan yang dikemukakan mungkin adalah kata dengar atau kenyataan kandang saksi atau kenyataan yang mana boleh dianggap sebagai kenyataan yang mementingkan diri sendiri (lihat perenggan 13).
- B (4) Asas fakta kes tidak membenarkan perbicaraan semula tetapi hanya pelepasan memandangkan ketidakadilan telah berlaku pada peringkat pendakwaan dan juga pada akhir perbicaraan dan kesahihan keseluruhan proses perbicaraan telah terjejas (lihat perenggan 20).
- C (5) Isu berkenaan dengan pencabaran adalah hanya bersifat prosedur dan tidak boleh diperbaiki di bawah s 422 KTJ atau s 60 Akta Mahkamah Kehakiman 1964. Kedua-dua saksi dan juga kenyataan warganegara Myanmar yang mana tidak dibenarkan untuk dimasukkan atas dasar pembelaan tidak mengambil langkah-langkah untuk menjejaki saksi apabila keterangan menunjukkan bahawa warganegara Myanmar telah meninggalkan negara adalah berlawanan dengan pembelaan untuk mematahkan anggapan mengedar yang mana membawa penalti hukuman mati (lihat perenggan 30).]
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Notes

- E For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

Cases referred to

- Crane v Director of Public Prosecutions* [1921] 2 AC 299, HL (refd)
- F *King Sing Hock & Anor v PP* Criminal No J-05–68 of 2009 (unreported), CA (refd)
- Leong Bon Huat v PP* [1993] 3 MLJ 11, SC (refd)
- Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169; [1991] 3 CLJ 2073, SC (refd)
- G *Muthusamy v PP* [1948] 1 MLJ 57 (refd)
- PP v Ang Soon Huat* [1991] 1 MLJ 1, HC (refd)
- R v Gee. R v Dunscombe* [1936] 2 All ER 89 (refd)
- Sochima Okoye v PP* [1995] 1 MLJ 538, CA (refd)
- Subramaniam v PP* [1956] 1 MLJ 220, PC (refd)
- H *Tunde Apatira & Ors v PP* [2001] 1 MLJ 259, FC (refd)
- Yee Wen Chin v PP* [2008] 6 MLJ 222; [2008] 6 CLJ 773, CA (refd)
- Yusof bin A Samad v PP* [2000] 4 SLR 58, HC (refd)

Legislation referred to

- I Courts of Judicature Act 1964 s 60
- Criminal Procedure Code ss 182A, 422
- Dangerous Drugs Act 1952 ss 2, 12(2), 39A(2), 39B(1)(a)
- Federal Constitution art 5(1)
- Penal Code s 34

Appeal from: Criminal Trial Nos 45–27 & 28 of 2008 (High Court, Shah Alam) A

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.

Amirul Ridzuan Hanif (Hanif & Co) for the appellant.

Mohamad Abazafree (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent. B

Hamid Sultan JCA (delivering judgment of the court):

[1] Both the appellant/accused's appeal against conviction and sentence came up for hearing on 25 January 2013 and upon hearing we were unanimous in allowing the appeals. My learned brothers Mohamed Apandi bin Hj Ali JCA and Linton Albert JCA have read the draft judgment and approved the same. This is our judgment. C D

[2] At the outset we must say this is a classic case of mistrial as well as miscarriage of justice. The judgment reflects that the learned trial judge had not directed her mind to the criminal procedure code, practice and procedure relating to criminal jurisprudence. Such a judgment is unusual in capital punishment cases. We will elaborate this issue in later part of the judgment. E

[3] The first and the second appellant are represented by different solicitors. Learned counsel for the second appellant by and large adopts the submission of the first appellant. Learned counsel for the first appellant summarises the complaints to four issues which is reflected in the petition of appeal. They are as follows: F

- (a) the learned trial judge misdirected herself when she failed to direct her mind to the alternative charges preferred. Further, at the end of the defence case Her Ladyship failed to rule whether the prosecution had proved the trafficking charge in respect of the 12g of nimetazepam (P5) has been proven by the prosecution beyond reasonable doubt; G
- (b) the learned trial judge erred in law and in fact when she prematurely and/or wrongly impeached both SP2 (Taj Malaysia Singh) and SD2 (Lim Sek Yee); H
- (c) the learned trial judge misdirected herself when she found that there was mens rea for possession proven and in any event she erred in invoking the trafficking definition under s 2 of the Dangerous Act 1952 to rule that there was a prima facie case of trafficking; and I
- (d) the learned trial judge erred when she failed to appreciate the defence of the first appellant.

A BRIEF FACTS OF THE CHARGE AND JUDGMENT

B [4] Both the appellant's as per exh P4 (charge) were charged for trafficking in 143.8g of methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA 1952') to be read with s 34 of the Penal Code. Similarly they were also charged as per exh P5 (charge) for trafficking 12g of nimetazepam.

C [5] As alternative to both the charges, they were charged for possession, as per exhs P6 and P7 under s 12(2) of the DDA 1952 to be sentenced under s 39A(2) to be read with s 34 of the Penal Code. Exhibits P4–7, inter alia, read as follows:

P4

D Bahawa kamu bersama pada 3hb Februari 2008, jam lebih kurang 6.30 petang di kawasan Restoran Hwa Keng, Jalan Kenari 6, Bandar Puchong Jaya, Puchong, di dalam Daerah Petaling di dalam Negeri Selangor Darul Ehsan dalam melaksanakan niat bersama, kamu telah memperedarkan dadah berbahaya jenis Methamphetamine seberat 143.8 gram dan dengan itu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama yang dibaca dengan Seksyen 34 Kanun Keseksaan.

P5

F Bahawa kamu bersama-sama pada 3hb Februari 2008, jam lebih kurang 6.30 petang di kawasan Restoran Hwa Keng, Jalan Kenari 6, Bandar Puchong Jaya, Puchong, di dalam Daerah Petaling di dalam Negeri Selangor Darul Ehsan dalam melaksanakan niat bersama, kamu telah memperedarkan 2000 biji pil yang mengandungi dadah berbahaya jenis Nimetazepam seberat 12.0 gram dan dengan itu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama yang dibaca dengan Seksyen 34 Kanun Keseksaan.

G Alternative charges:

P6

H Bahawa kamu pada 3hb Februari 2008, jam lebih kurang 6.30 petang di kawasan Restoran Hwa Keng, Jalan Kenari 6, Bandar Puchong Jaya, Puchong, di dalam Daerah Petaling di dalam Negeri Selangor Darul Ehsan, lanjutan dari niat bersama kamu, didapati telah ada dalam milikan kamu dadah berbahaya jenis Methamphetamine seberat 143.8 gram dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39A(2) Akta yang sama yang dibaca dengan Seksyen 34 Kanun Keseksaan.

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Bahawa kamu pada 3hb Februari 2008, jam lebih kurang 6.30 petang di kawasan Restoran Hwa Keng, Jalan Kenari 6, Bandar Puchong Jaya, Puchong, di dalam Daerah Petaling di dalam Negeri Selangor Darul Ehsan, lanjutan dari niat bersama

kamu, didapati telah ada dalam milikan kamu dadah berbahaya jenis Nimetazepam seberat 12.0 gram dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 12(3) Akta yang sama yang dibaca dengan Seksyen 34.

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[6] The learned judge at the end of the prosecution case says that the prosecution had succeeded in establishing a prima facie case against the two accused persons as per the two counts of drug trafficking. That part of the judgment reads as follows:

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The prosecution called seven witnesses in order to establish a prima facie case against the two accused persons. At the close of the prosecution case the court was satisfied that the prosecution had succeeded in establishing a prima facie case against the two accused persons as per the two counts of drug trafficking pursuant to s 180 of the Criminal Procedure Code (the 'CPC') (the 'first decision').

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[7] The two counts referred to must have been exhs P4 and P5, ie trafficking in methamphetamine and other nimetazepam. No mention was made about the alternative charges in the judgment. However, at the close of the defence case the learned judge says that the prosecution had proved the first charge as per exh P4 against the two accused persons and sentenced them to death without mentioning anything about the second charge relating to exh P5 and no mention at all of the exhs P6 and P7. That part of the judgment reads as follows:

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At the close of the defence case, the court did not believe the testimonies of the two accused persons and their three witnesses. The court was also satisfied that the defences of the two accused persons were not consistent, might not reasonably be true, had failed to rebut the meaning of 'trafficking' as contained in s 2 of the DDA and also the statutory presumption of 'trafficking' on the balance of probabilities, did not cast a doubt on the prosecution case and that the prosecution had proved the first charge as per P4 against the two accused persons beyond reasonable doubt.

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[8] In conclusion the judgment says:

In view of the reasons as set out above, the court was satisfied that the prosecution had proved beyond reasonable doubt that the two accused persons were trafficking in the 143.8g of methamphetamine as per the charge in P4. The court, therefore, found the two accused persons guilty of trafficking in the 143.8g of methamphetamine as per the charge in P4. The court convicted them and imposed on each of them the mandatory death sentence pursuant to s 39B(2) of the DDA.

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[9] It must be stated from the above sequence and judgment, the judgment of the trial court is inchoate, not focused and the grounds of the judgment shows that the integrity of the decision making process has been compromised

A without adhering to the strict provision of the Criminal Procedure Code and that too in a capital punishment case where the Constitutional provisions are clear that the court can only take the life of a person according to law. And that art 5(1) of the Federal Constitution reads as follows:

B (1) No person shall be deprived of his life or personal liberty save in accordance with law.

C [10] It must be noted here that the prosecution has preferred two charges for trafficking and in the alternative possession which carries lesser sentence and the law at the end of trial requires the court to consider the relevant charges as well as the evidence. By calling defence for two charges and finding only one charge has been proved when both types of drugs were seized at the same time with no explanation, compromises the decision and is also in conflict, ie one charge trafficking proved and the other charge not proved. And there was also no order for acquittal in respect of the second charge which technically will be hanging over the heads of the appellants and such a decision is not only perverse but also in breach of s 182A of the CPC which states as follows:

E (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.

F (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

G [11] Further, in the instant case the court readily went and applied the presumption of trafficking without addressing its mind to the fact that the prosecution per se was not sure whether it was a case of *trafficking or possession*. (Emphasis added.) On the factual matrix of the case the court should have deliberated on the issue of possession before applying its mind to trafficking which at the end of the day may result in capital punishment. Support for similar proposition can be found in a number of cases. To name a few are as follows:

H (a) in *Public Prosecutor v Ang Soon Huat* [1991] 1 MLJ 1 at p 13, Chan Sek Keong J had on the facts this to say:

I In the circumstances of the present case, we have decided that the proper course for this court to take is not to accept the suggestion of counsel for the accused as it lacks both logic and rationality, but to apply the principle that where the court is, on the evidence, left in doubt as to whether the accused has committed an offence in a lower or a higher degree of seriousness, the court

should make a finding in the lower degree, particularly in a case in which a finding in a higher degree will give rise to a mandatory sentence of death. Accordingly, we find the accused guilty of trafficking in not less than 10g and not more than 15g of heroin at the time and date stated in the charge. We convict him accordingly.

- (b) the case of *Ang Soon Huat* was followed in *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 where the Supreme Court at p 15 stated:

We note that in the Singapore case of *Public Prosecutor v Ang Soon Huat*, where one of the contentions advanced by counsel for the accused was similar to that advanced in the present appeal, and where the contention was upheld, the court having reminded itself of the criminal standard of proof, had concluded that where the court was left in doubt as to whether the accused has committed an offence in a lower or higher degree of seriousness, the court should make a finding in the lower degree, particularly where a finding in a higher degree will give rise to a mandatory sentence of death.

The result, therefore, was that so far as the charge of trafficking in cannabis in contravention of s 39B was concerned, 'the case against the appellant was not proved with the certainty which is necessary in order to justify a verdict of guilty' (per Lord Hewart CJ in *R v Wallace* applied by Thomson CJ in *Jubri v Public Prosecutor*.)

Accordingly, we have no option but to allow the appeal, to quash the conviction for trafficking in cannabis, to set aside the sentence, and to substitute in lieu thereof, a conviction for possession of cannabis in contravention of s 39A of the Act and a sentence of life imprisonment to take effect from the date of arrest, with the mandatory ten strokes of the *rotan*.

[12] We must caution here that it all depends on the factual matrix of the case or relating to capital punishment cases only and must not be taken in isolation to say if alternative charge is not considered it amounts to mistrial or the accused must be convicted for a lesser charge. What needs to be asserted here is in all capital punishment cases where there is no direct evidence of trafficking, it does not fall upon the court to rely on the presumption of trafficking to pave way for the accused to be convicted and hanged for trafficking when the prosecution has readily offered an alternative charge.

[13] In addition we must say that the learned judge did not deliberate on the issue of possession before convicting on the charge of trafficking (see *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 1 CLJ 2073). It must be said here that just because the accused has been called to enter defence for trafficking does not necessarily mean the issue relating to possession should not be considered at all. There is duty and obligation on the part of the trial judge to hear what the accused or his witness has to say in relation to their defence notwithstanding the evidence adduced may be hearsay or even dock statement or even a statement which can be perceived to be self serving

- A statement. It is well settled that it is the duty of the prosecution to prove its case beyond reasonable doubt without reliance of any hearsay statement unless the law allows it to be admitted. Such strictures are not placed for the defence (see *Subramaniam v Public Prosecutor* [1956] 1 MLJ 220). The court is obliged to consider the evidence of the defence justly and fairly whether it be hearsay or
- B dock statement with no obligation to believe the same save as to the requirement to give reasons only why the court rejects the evidence of the accused. In *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073, the Supreme Court held:
- C Whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v Public Prosecutor* [1963] 1 MLJ 263 examine whether even though the court is not satisfied with the defence story, to ask whether in spite of this, the defence story casts a reasonable doubt on the prosecution case. To satisfy
- D this test, of importance is not the words used by the judge but rather the actual application of the test to the facts of the case. In this case, the learned judge offered practically no reason why the defence notwithstanding its falsity and unconvincing nature, had failed to cast a reasonable doubt on the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.
- E Unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on a balance of probability on the evidence the defence has rebutted the statutory presumption of trafficking under s 37(da) of the Act as a separate exercise even though the court is satisfied on a balance that the presumption of possession under s 37(d) of the Act has not been
- F rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.
- [14] In essence at close of the defence case the court must deal with the issue of trafficking as well as possession. It may be at the end of the case either acquit
- G where the issue of trafficking has been rebutted but where the charge for possession can be sustained the accused must be sentenced accordingly (see *Yee Wen Chin v Public Prosecutor* [2008] 6 MLJ 222; [2008] 6 CLJ 773). Support for the above proposition is found in a number of cases. In *Sochima Okoye v Public Prosecutor* [1995] 1 MLJ 538, Gopal Sri Ram JCA (as he then was) held:
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- I
- (1) In a criminal case, the prosecution bears a general burden of proof to prove beyond reasonable doubt the guilt of the accused. The prosecution may rely on available statutory presumptions to prove the essential ingredients of the charge. When that occurs, the particular burden of proof shifts to the defence to rebut such presumptions on the balance of probabilities.
 - (2) In the present case, merely because the defence had failed to rebut the presumption of possession under s 37(d) of the Act did not mean that the presumption of trafficking under s 37(da) of the Act would become irrebuttable. Unless the evidence in a particular case did not so warrant,

the court must consider whether on a balance of probabilities the defence had rebutted the statutory presumption of trafficking under s 37(da) as a separate exercise even though it was satisfied on balance that the presumption under s 37(d) had not been rebutted.

A

- (3) Reading the judgment of the trial judge as a whole, it was clear that no such separate exercise had been carried out. The use of the expression 'presumptions' by the trial judge did not amount to sufficient compliance with the aforesaid requirement.

B

- (4) The judge, having found the appellant's story about the existence of Smith to be true, ought to have addressed his mind to the further question as to whether there was any reasonable doubt raised that Smith was the real trafficker, but did not do so.

C

- (5) The failure of the judge to properly direct himself rendered his ultimate conclusion fatally flawed. A miscarriage of justice might well have occurred and the court had no alternative but to set aside the death sentence and enter a conviction for possession under s 39A(2) of the Act. The appellant was sentenced to life imprisonment and 12 strokes of the *rotan*.

D

[15] Learned counsel for the appellant in respect of the above issues submits as follows:

E

Ground One - No consideration of the alternative charges and no ruling/finding on the alleged trafficking of 12 grams of Nimetazeoam [P5]

The complaint is regard to the approach taken by the learned trial judge. This complaint is in two parts. They are:

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- (i) No consideration of the alternative charges, and
- (ii) No ruling at end of defence case whether the prosecution has proved its case of trafficking of the 12 grams of Nimetazepam (P5) beyond reasonable doubt.

G

No consideration of the alternative charges

This is a point of law. Apart from the principal charges of trafficking the prosecution also on the commencement of the trial tendered 2 separate alternative charges of possession in respect of the methamphetamine and nimetazepam punishable under sections 39A(2) and 12(3) respectively.

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It is respectfully submitted that the learned trial judge, did not consider, at the end of the prosecution's case as to whether a prima facie case of mere possession has been proven by the prosecution. In short the learned trial judge should have asked why the case against both the appellants cannot be a case of possession instead of trafficking.

I

By reason of the stance taken by the prosecution, the learned trial judge is put to consider the evidence adduced and then elect whether this is a case of possession or trafficking and in the event of an election being made, to give reasons.

- A In this regard, both the appellants have been seriously prejudiced in that had the court considered the two scenarios and should the court be doubtful, then it is trite law that an accused person ought to be penalized to an offence that is of the lower degree, in this case possession.
- B The first appellant relies on the following authorities to support his position:
- (a) *PP v Ang Soon Huat* [1991] 1 MLJ 1
 - (b) *Leong Bon Huat v PP* [1993] 3 MLJ 11
- C This omission or non-direction amounts to a serious miscarriage of justice and on this ground alone the convictions against the appellants cannot stand.
- D It must be appreciated that in making this submission the first appellant is not conceding that possession had been proven by the prosecution.
- E *No ruling at the end of the defence case whether the prosecution had proved beyond reasonable doubt the trafficking of 12 grams of nimetazepam (P5)*
- F This is another point of law. At the end of the prosecution's case the court found that a prima facie case of trafficking has been proven in respect of both the trafficking charge (P4) with regard to the methamphetamine charge. It is very clear that at the end of the prosecution's case the learned trial judge only found that there is a prima facie case of trafficking in respect of P4 and both appellants were ordered to enter defence only in respect of this charge. There is no ruling or finding with regard to P5, the other trafficking charge involving 12 grams of nimetazepam. We do not know what has happened to the other charge.
- G However in her written grounds the learned trial judge found a prima facie case in respect of both the trafficking charges. This can be seen at pg 465 of the AR Vol 5 where she said:
- ... At the close of the prosecution case the court was satisfied that the prosecution had succeeded in establishing a prima facie case against the 2 accused persons as per the 2 counts of drug trafficking pursuant to s 180 of the Criminal Procedure Code (the 'CPC') (the 'first decision').
- H There is confusion again when at the end of her written grounds, after the defence case, the learned trial judge again did not rule whether the prosecution had proven its case of trafficking against both the appellants in respect of the 12 grams of nimetazepam. This can be seen at her conclusion at pg 528 of the AR Vol 6 where reference was made only to the methamphetamine charge.
- I This is a further added reason why the convictions cannot stand.
- [16] We find the submission has merits even though the appellants or the respondents were not able to support it with authorities for or against, except the two decisions cited above. However, we must say the learned deputy public prosecutor was magnanimous to say that the grounds of judgment does not deal with the complaints raised by the first appellant but says that as the learned judge has dealt with the main charge and in consequence the alternative charge

need not be considered. And asserts in any event it can be cured by s 60 of the Courts of Judicature Act 1964 which reads as follows:

- (1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

- (2) At the hearing of an appeal the Court of Appeal may, if it thinks that a different sentence should have been passed, quash the sentence passed, confirmed or varied by the High Court and pass such other sentence warranted in law (whether more or less severe) in substitution therefore as it thinks ought to have been passed.

[17] On the issue of the second charge (exh P5) was not dealt by the learned judge. The learned deputy public prosecutor invites us to re-evaluate the evidence as a whole and convict and sentence the accused for the second charge (exh P5) for trafficking and for this purpose relies on the case *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259.

[18] We do not think we can accede to the invitation of the learned deputy public prosecutor as it is a clear case of 'inter alia' statutory as well as constitutional breach which we have adumbrated earlier and a classic case of mistrial and miscarriage of justice.

[19] In *Crane v Director of Public Prosecutions* [1921] 2 AC 299 the House of Lords on the facts of the case asserted that mistrial amounted to no trial. When it is a case of mistrial the court has two options. One to order for retrial and the other to order an acquittal where the contests of justice requires. Support for the proposition is found in the case of *R v Gee*. *R v Dunscombe* [1936] 2 All ER 89 where it was stated:

... The result is that there has been what is sometimes called a *mistrial*; in this case it would perhaps be more correct to say that there had been no trial at all. Under the decision in *Crane v Director of Public Prosecutions*, this court has power to order that a proper trial should take place; as it was put in that case, 'that the proceedings should re-commence from the point where they broke down'. Therefore this court has power to order that these men should be taken back and that the proceedings

A should be re-commenced de novo, that the depositions be properly taken and the men brought before the court of quarter sessions.

But this court has also power, where it thinks the interests of justice require it, to order that a verdict of acquittal should be entered and to allow the prisoners to be discharged. In the circumstances of this case the court thinks that is a proper order to make here, because these men were in custody three months before trial. They were then held to bail with this charge hanging over them for another three months. They were then tried and convicted on 13 March. They have been in custody another two months, and if this court were to order a new trial and the proceedings had to begin again, they would have to wait for trial before quarter sessions, which would probably be in July. It would be oppressive to commit them for retrial. In the circumstances, therefore, the court has come to the conclusion that the conviction should be quashed and that the men should be discharged. We also express the hope that, if this procedure obtains elsewhere, the magistrates will comply strictly with the requirements of the Act. The order of the court is therefore that the conviction be quashed and the prisoners be discharged.

E [20] The factual matrix of the case does not warrant a re-trial but only an acquittal as miscarriage of justice has set in at the prosecution stage as well as at the end of trial and the integrity of the whole trial process has been compromised for reasons we have stated earlier.

F [21] Leaving aside the issue of mistrial and miscarriage of justice, we think it is also appropriate to address the other grievances raised by the appellants. For this purpose we need to set out the brief facts.

BRIEF FACTS

G [22] The facts of the case as per prosecution as well as the appellants version had been well articulated by the learned judge and it needs no repetition and it is sufficient if it is summarised as follows:

- (a) a raiding party consisting of SP3 saw the first appellant coming in a Proton Wira driven by SP2;
- H (b) the first appellant came out of the car and went to a nearby restaurant;
- (c) about 15 minutes later a Kanchil car came and parked next to the Proton Wira;
- I (d) the first appellant went to the Kanchil and a red bag through the driver's window was handed over to the first appellant by the second appellant;
- (e) the first appellant then walked to the restaurant and sat at the table which he had previously occupied and at that point of time SP3 gave instructions to his men to arrest the first appellant;

- (f) the first appellant was arrested and it was said to have been a struggle and the red bag was seized; A
- (g) meanwhile SP2 and the second appellant were arrested;
- (h) the red bag contained drugs which are the subject matter of the respective charge; B
- (i) no drugs were recovered from both the cars;
- (j) the search list was signed by the appellants as well as SP2; and
- (k) the solicitor's had written a letter to the office of the deputy public prosecutor to record statements from three witnesses, one Myanmar national working as a waiter and the other who was selling satay nearby and Lim Sek Hee (SD2) who was in the restaurant and who gave evidence for the defence and was impeached by the learned judge at cross-examination stage itself. C D

[23] The defence's version has been summarised by learned counsel for the first appellant and reads as follows:

The defence of the first appellant can be summarised as follows: the first appellant is a motor mechanic and it was his version the Proton belonged to one Ah Soon who had sent the car to the first appellant for repairs. The first appellant then asked SP2, his colleague, to help repair the car as he was busy with Chinese New Year preparations. On the day in question Ah Soon phoned him at about 4pm and told the first appellant to drive his Proton to the restaurant between 6–7pm for the return of his car. At about 5pm Ah Soon called him again and asked him to help pick up a Chinese New Year present from Ah Soon's friend, Ah Girl. The first appellant agreed and he then asked SP2 to drive the Proton to the restaurant. When the first appellant arrived at the restaurant he went and sat at a table at its five foot way while SP2 waited in the Proton. The first appellant then ordered food. It was his evidence that later Ah Soon called him again and told him that Ah Girl had asked a person by the name of Ah Ken to deliver the present to him. The first appellant said that he was seated at the table with two of Ah Soon's friends. *While he was waiting and having food Ah Ken (later identified as the second appellant) came, identified himself and handed the present to the first appellant by placing the bag under the table.* Soon after the second appellant left and when he wanted to order a drink for SP2 he was suddenly pushed down by 7–8 persons and was immediately handcuffed. He saw both the second appellant and SP2 were also arrested. E F G H

At the Subang Police Station the first appellant said he told the police about Ah Soon and Ah Girl and the bag. The first appellant called SD2 (Lim Sek Yee) and SD3 (Halimah) who were present at the restaurant that evening as his witnesses. SD2 was impeached. The learned trial judge did not believe the first appellant. I

[24] It must be noted from the factual matrix of the case the only persons who will be able to corroborate the evidence of the appellant and was at the

A scene was SP2 and three witnesses from whom the solicitors had informed the deputy public prosecutor to take the witness statement. It is found at pp 473–474 of the judgment and reads as follows:

B On 27 August 2008, as a result of a letter written by KL Chee to the DPP, the DPP had directed him to record statements from three witnesses, namely, Aung Zaw Min, a Myanmar national, who was working as a waiter in the restaurant on the day in question, Halimah bt Soleh, the woman who was selling satay at the satay stall at the 5-foot way of the restaurant at the material time and the cashier who was working in the restaurant at the material time. He had visited the restaurant on 17 September 2008. He had recorded the statements of the three alleged witnesses at the restaurant.

D [25] The irony in the instant case was that SP2 evidence was impeached while he was giving evidence and one of the three witnesses (SD2) stated above who gave evidence at the defence stage was also impeached while giving evidence. And the other two potential witnesses for the defence case, the prosecution did not produce. In addition the learned trial judge refused to allow the witness statement of one of the three persons who was a Myanmar national working in the restaurant and who had left the country to be tendered in court, on the grounds the defence did not take sufficient steps to secure the witness that too to a person who had left the country.

F [26] Learned counsel for the first appellant says the impeachment of SP2 for a trivial memory lapse of the name of restaurant was unwarranted and the memory lapse could be overcome by refreshing his memory. And relies on the case of *Muthusamy v Public Prosecutor* [1948] 1 MLJ 57 to drive home the point.

G [27] In addition asserts that it was plainly wrong for the learned judge to impeach while SP2 was giving evidence and should have waited until the end of the prosecution stage. And relies on the Court of Appeal decision in *King Sing Hock & Anor v Public Prosecutor* Jenayah No J-05–68 of 2009.

H [28] On similar note learned counsel says SD2 should not have been impeached while giving evidence and the impeachment should have taken place at the end of the case. And concludes that both the impeachments have prejudiced the defence case.

I [29] The learned deputy public prosecutor concedes that impeachment should not have been done while the witness is giving evidence. However, the learned deputy proceeds to argue that the procedural irregularity can be cured. And relies on a Singapore case cited as *Yusof bin A Samad v Public Prosecutor* [2000] 4 SLR 58, where it was stated:

... Thus, the procedural objection raised by the appellant's counsel was well-founded. Nevertheless, this procedural irregularity was a minor one, and it did not cause any prejudice to the appellant. Section 396 of the CPC states:

Subject to the provisions hereinbefore contained, no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of-

(a) Any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;

...

In addressing the question whether there was any failure or miscarriage of justice or whether a conviction was unsafe, the court will ask itself the subjective question of whether it was content to allow the verdict to stand, or whether there was some lurking doubt that an injustice had been done to the appellant: *Tan Choon Huat v Public Prosecutor* [1991] 3 MLJ 230; [1991] SLR 805. I had no doubt whatsoever that the procedural irregularity had not occasioned a failure of justice in the present case. As such, it was appropriate for me to overlook it.

[30] We do not think the issues relating to impeachment are purely procedural and can be cured under s 422 of the CPC or s 60 of the CJA 1964. These two witnesses as well as the statement of the Myanmar national which was not allowed to be admissible on the grounds the defence did not take steps to trace the witness when the evidence is that the Myanmar national has left the country is perverse to the defence to rebut the presumption of trafficking which carries the penalty of death. It is like tying the hands of the defence in all aspect and inviting the defence to rebut the presumption that too on the required standard of balance of probabilities, a conduct which no criminal court ought to be a party to in the administration of criminal justice.

[31] The instant facts also demonstrates a clear case of miscarriage of justice and we like to make it clear that we would have allowed the appeal independent of the mistrial issue, adumbrated earlier. On the totality of the case, there are serious errors and most of the errors related to non-direction which amount to misdirection making the conviction unsafe.

[32] For reasons stated above, the appeal by the appellants are allowed. Conviction and sentence of the High Court set aside. The appellants are acquitted and discharged of all charges.

[33] We hereby order so.

Appeals allowed.

Reported by Afq Mohamad Noor